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No. 92-1774

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In the Supreme Court of the United States

OCTOBER TERM, 1993

REGINALD T. HUEY, PETITIONER

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Sections 113 and 114 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079, apply to cases that were pending on the date of enactment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 971 F.2d 1362. The opinion of the district court (Pet. App. A13-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on January 28, 1993. Pet. App. A25. The petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is employed by the Department of Health and Human Services (HHS). In 1978, he filed an administrative complaint alleging that he had been discriminated against on the basis of his race when HHS did not select him for promotion to any of twelve GS-12 positions for which he had applied. HHS determined that there had been no improper discrimination. Petitioner appealed to the Equal Employment Opportunity Commission (EEOC), which remanded to HHS for additional factfinding. On remand, HHS held that petitioner's allegations as to seven of the positions were untimely. As to the remaining five positions, HHS again found that there had been no improper discrimination. HHS noted, however, that numerous records relating to the selection decisions had been destroyed. Pet. App. A2.

On petitioner's second administrative appeal, the EEOC upheld HHS's determination that petitioner's challenge was untimely as to seven of the positions. As to the other five positions, however, the EEOC ruled against HHS on the basis of the missing documents. The EEOC ordered HHS to promote petitioner to a GS-12 position that was substantially equivalent to any of those five positions. In addition, the EEOC awarded petitioner back pay and attorney's fees. Pet. App. A2-A4.

Petitioner then brought this Title VII action for enforcement of the EEOC's order. See 42 U.S.C. 2000e-16. Petitioner also sought interest on his back pay award and reimbursement for fees that he had paid to an accountant to calculate the amount of back pay due. The district court granted enforcement of the EEOC's order, but denied petitioner's claims for interest and accountant's fees. Pet. App. A4-A5.[1]

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[1] The court agreed with the government that HHS, not petitioner, had the right to select a specific position for petitioner.

Petitioner appealed from the denial of his claims for interest and accountant's fees. The court of appeals affirmed. Pet. App. A1-A12. The court explained that the law at the time of the district court's decision did not provide for interest on the back pay award or for reimbursement of accountant's fees. *Id.* at A6, A8-A11. The court also rejected petitioner's argument that interest and accountant's fees were available in this case under Sections 113 and 114 of the Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 113 and 114, 105 Stat. 1079. The court held that those provisions, which were enacted while petitioner's appeal was pending, applied prospectively only. Pet. App. A7-A8 & n.5. The court observed that "the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States * * * makes a finding of no retroactivity even more compelling in this case." *Id.* at A7-A8. See also *id.* at A8 n.5.[2]

DISCUSSION

Section 113 of the Civil Rights Act of 1991 provides that the term "attorney's fee" in Title VII's attorney's fees provision includes "expert fees." 105 Stat. 1079 (amending 42 U.S.C. 2000e-5(k)). Section 114 of the Act provides that, in Title VII actions against the government, "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 105 Stat. 1079 (amending 42 U.S.C.

Pet. App. A4. In addition, the court awarded petitioner some but not all of the attorney's fees that he incurred in the district court proceeding. *Ibid.*

[2] The court of appeals rejected the government's contention that it lacked appellate jurisdiction. Pet. App. A5-A6. The court also agreed with the district court that petitioner was entitled to only a portion of his attorney's fees incurred in the district court proceedings. *Id.* at A11-A12.

2000e-16(d)). Petitioner contends that he is entitled to accountant's fees and interest on his back pay award under these provisions.

The petition should be held pending this Court's disposition of *Landgraf* v. *USI Film Products*, No. 92-757, and *Rivers* v. *Roadway Express, Inc.*, No. 92-938. In those cases, the Court has granted certiorari on the question whether Sections 101 and 102 of the Civil Rights Act of 1991, 105 Stat. 1071-1072, 1072-1074, apply to claims that were pending before the statute's enactment. The United States and the EEOC have filed a brief in *Landgraf* and *Rivers* as *amici curiae* arguing that (1) textual analysis of the Act leads to the conclusion that, except as otherwise specifically provided, the Act generally applies to pending cases, and (2) even in the absence of clear evidence of congressional intent, it is proper for courts to presume that procedural and remedial provisions apply to pending cases. 92-757 U.S. Br. at 12-21.[3]

This case differs in some respects from *Landgraf* and *Rivers*. The defendants in *Landgraf* and *Rivers* are private parties, while this case is an action against the government. As the court of appeals noted (Pet. App. A7-A8), considerations of sovereign immunity may be pertinent to the retroactivity analysis. See 92-757 U.S. Br. at 21 n.11 (noting that the presumption that procedural and remedial provisions apply to pending cases may not apply in actions against the government, because statutory waivers of sovereign immunity are strictly construed and must be express rather than implied). In addition, this case concerns Sections 113 and 114 of the Civil Rights Act of 1991; *Landgraf* and *Rivers* concern Sec-

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[3] The government took a different position before the court of appeals in this case. As we explain in our brief in *Landgraf* and *Rivers*, the government has reexamined its position. 92-757 U.S. Br. at 9 n.2.

tions 101 and 102 of that Act. Despite these differences, this Court's resolution of the question presented in *Landgraf* and *Rivers* may have a significant bearing on the proper disposition of this case. We therefore agree with petitioner that it would be appropriate to hold this case pending the outcome of *Landgraf* and *Rivers*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Landgraf* v. *USI Film Products*, No. 92-757, and *Rivers* v. *Roadway Express, Inc.*, No. 92-938, and then disposed of in light of the decisions in those cases.

Respectfully submitted.

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